UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/812
25 July 1997

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 812

Case No. 881: EVERETT

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Mayer Gabay; Mrs. Deborah Taylor Ashford;

Whereas at the request of Mavis A. Everett, a former staff member of the United Nations Development Programme (hereinafter referred to as UNDP), the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit for the filing of an application with the Tribunal until 31 January, 30 April, 31 July and 31 October 1995;

Whereas, on 18 October 1995, the Applicant filed an application which contained pleas requesting the Tribunal to order the Respondent:

> "(a) To rescind forthwith the decision to place her on special leave with full pay (SLWFP);
>
> (b) To assign her to her post No. 78607 which she encumbered before she was sent on SLWFP, or an established G-6 post (not a temporary post) commensurate with her qualifications and experience;
>
> (c) To credit her with all annual leave entitlement accrued from 17 May 1993 to the date she is reinstated ...; and
>
> (d) To compensate her in the amount of $10,000, for the personal injury, humiliation and stress suffered as a result of the uncertainties to which she has been subjected."

Whereas, on 17 September 1996, the Applicant communicated to the Tribunal that, on 28 August 1996, she had received notice that her separation would take effect on 31 August 1996;

Whereas the Respondent filed his answer on 23 September 1996;

Whereas the Applicant filed written observations on 31 October 1996, in which she amended her pleas to delete subsection (c) above and to replace it with the following:

> "That should the Respondent decide, in the interest of both parties, not to reinstate her in her post or another G-6 core post commensurate with her qualifications and experience, that compensation be ordered in the amount of three years' net base salary compounded from 9 February 1997, the date up to which she was apparently guaranteed employment against Post No. 1388 (...), through 30 November 1999, the date on which she would have retired from the Organization.
>
> That the Respondent be ordered to pay an additional compensation in the amount of five months and nine days' net base salary, compounded from 31 August 1996, the expiry date of the SLWFP (which coincides with the date of her separation), and 9 February 1997, the date up to which she was apparently guaranteed employment against Post No. 1388."

Whereas, on 16 June 1997, the Applicant filed additional documents and comments with the Tribunal;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNDP on 6 January 1977 on a three-month, fixed-term appointment as a Clerk/Stenographer at the G-3, step IV level. Her appointment was subsequently extended and, on 1 January 1983, became probationary. On 1 January 1983, the Applicant was promoted to the G-4 level, and her functional title changed to Secretary. The Applicant was granted a permanent appointment with effect from 1 January 1984. She was assigned to the Division of Personnel (DOP), Policies and Compensation Section. With effect from 1 January 1986, she was promoted to the G-5 level and, on 1 January 1991, she was promoted to the G-6 level, as a

Classification Assistant. From 23 March 1991 to 24 June 1991, she was assigned to the UNDP office in Namibia as a Job Classification Examiner.

On 24 February 1993, the Applicant signed her performance appraisal review (PAR) for the year 1992 with a rating of 5, i.e. unsatisfactory, by the Management Review Group (MRG). In section 10 of the PAR, the MRG justified this rating, inter alia, as follows:

> "... the MRG views with utmost seriousness the problems ... regarding her difficulty in maintaining harmonious relations with her colleagues in the classification programme. ... In this regard, it is the view of the MRG that these difficulties and their impact, which go beyond affecting the work of the incumbent, would more appropriately support a final PAR rating of five. In arriving at this conclusion, the MRG notes that the specifications for a five rating of unsatisfactory performance specify that difficulties in working relations with others which are poor to the point of being detrimental to the work warrant the five rating. This situation clearly prevails in this case. The MRG wishes to go on and note that the problems existing for [the Applicant] are not related to simple misunderstandings regarding her assignments. Indeed it does acknowledge that the technical work produced is usually satisfactory. However the use of abusive language, the lack of positive interaction on a daily basis or during general meetings of the classification staff make it difficult to envisage what remedial actions could be taken to improve the working relationships. The behaviour displayed by [the Applicant] which has contributed to stress in the work place goes beyond simple misunderstandings. Whatever the steps which are now taken, it is clear that the classification programme can no longer sustain what has become an untenable situation."

The Applicant, in her final comments on the PAR, requested that arrangements be made for a public inquiry into the allegations raised against her by the MRG.

On 27 May 1993, the Director, DOP, wrote to the Applicant informing her that he confirmed the decision to place her on special leave with full pay (SLWFP) for two months, beginning 17 May 1993, after a review of her 1992-93 performance, which concluded that she

could no longer serve in DOP. In his letter, the Director, DOP, also mentioned that "we will endeavour to find overseas postings for you in order to provide a fresh opportunity for you to perform satisfactorily." Further, he noted that, should an overseas posting not produce the "desired results", the Applicant should consider an agreed termination on the following terms: "with the most generous compensation the Staff Rules allow, inclusive of special leave with full pay until you reach early retirement age in November 1994. We honestly believe that if another opportunity for you cannot be found, early retirement may be in your own best interests. We believe continuation in the Division of Personnel is not in the best interests of team work so essential to our requirements".

On the same day, the Applicant sent a memorandum to the Director, DOP, in which she agreed to be assigned to a UN peace-keeping mission "for a limited period" on the understanding that "a lien on a core post with the UNDP at [the] ... level of G-6 will be maintained for the entire duration of [her] mission."

In a reply dated 21 June 1993, the Director, DOP, informed the Applicant that UNDP "will not be able to maintain a lien for you [the Applicant] against a specific post within UNDP while you [the Applicant] are on mission" but that UNDP "will endeavour to identify a suitable post for you [the Applicant] outside of the Division of Personnel at the conclusion of [her] ... mission assignment. Should all else fail, [UNDP] ... will be pleased to discuss an agreed separation ..."

On the same day, the Applicant submitted a rebuttal to her 1992 PAR, in accordance with the circular UNDP/ADM/93/21 of 30 April 1993.

On 26 July 1993, the Applicant lodged an appeal with the Joint Appeals Board (JAB) for the suspension of action on the decision to place her on SLWFP.

On 27 September 1993, the Chief, Staffing, DOP, wrote to the Applicant, informing her that she had not been placed in a vacant post during the recently conducted Staff Placement Exercise; he concluded by saying that the Applicant would "continue to be on SLWFP pending further efforts to identify a suitable assignment".

On 5 October 1993, the Applicant wrote to the Secretary of the JAB, again requesting a suspension of action as, due to an oversight, her first request had not been considered.

On 12 October 1993, the PAR Rebuttal Panel of Reference met to review the issues raised by the Applicant and interviewed several staff members from her former work unit, as well as members of the MRG.

On 4 November 1993, the JAB adopted its report on the request for suspension of action. Its considerations, conclusion and recommendation read, in part, as follows:

> "Considerations
>
> ...
>
> 15. Although the Panel could empathize with the Appellant's account of the psychological damage wrought by her suspension from her duties, it could not agree that that constituted irreparable harm.
>
> ...
>
> Conclusion and Recommendation
>
> 19. The Panel concludes that the decisions taken by UNDP, if allowed to take their course, will result in irreparable injury to Appellant and that, therefore, she is entitled to the protection afforded by a suspension of action.
>
> 20. ... The Panel recalls that the hearing on Appellant's request for a suspension of action was delayed for over two months because of an error on the part of the UN Administration (...). The Panel, therefore, urges the Administration to move quickly to limit further injury to Appellant.

> 21. The Panel recommends that action be suspended on filling core post No. 78607 until such time as Appellant is placed on another post or the appeals procedure is completed, whichever is the earlier. If that post has been filled at the time of the Secretary-General's decision on this recommendation, then, pending the outcome of the appeal, such other G-6 or G-7 level core post as may be available should be designated for the staff member by the UNDP Administrator."

On 19 November 1993, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed her as follows:

> "The Secretary-General ... has taken note of the Board's finding that the specific decision contested, the decision of UNDP to place you on special leave with full pay (SLWFP), will not, taken alone, cause you irreparable harm. As you have been on SLWFP since 17 May 1993, the Secretary-General finds that the decision contested has been fully implemented. In accordance therefore with staff rule 111.2(c)(ii), the Secretary-General has decided not to grant your request for suspension of action.
>
> Although the Secretary-General has addressed only your specific request, he has noted the concerns and recommendations of the Board regarding subsequent decisions of UNDP. The Secretary-General has also noted that UNDP's decisions were taken on the basis of your latest PAR and that the rebuttal process in respect of this PAR is near completion. When the results of the rebuttal process are a part of the record and when the Board has had a chance to thoroughly examine the substance of your appeal, the Secretary-General will consider the Board's recommendations with great care."

On 25 January 1994, the PAR Rebuttal Panel adopted its report, recommending, inter alia, that the MRG rating of "5" be upheld.

On 23 June 1994, the JAB adopted its report on the substance of the Applicant's appeal. Its unanimous recommendations read as follows:

"17. ...

(a) Placing the staff member on SLWFP was not a violation of her rights under the Staff Regulations and Rules. Although the manner in which it was done raises some questions of whether all the elements of due process were strictly observed, there was no evidence that any violation, if indeed there was one, entitles the Appellant to compensation.

(b) The Organization should make every effort to find suitable employment for the Appellant within the Organization, compatible with her abilities, including mission service. Such post need not conform, however, with the conditions the Appellant has sought to have attached to it which are not within her entitlements. In any post, Appellant should be provided with counselling to assist her with any problems of inter-personal relationships she may have.

(c) Should the Appellant refuse reasonable offers of suitable posts, a remedy other than the prolongation of SLWFP should be sought to regularize her status."

On 5 August 1994, the Secretary-General transmitted to the Applicant a copy of the JAB report and informed her as follows:

"The Secretary-General has examined your case in the light of the Board's report and has taken note of its conclusions that your rights were not violated and that you were not entitled to compensation. He has also taken note of the concerns of the Board regarding your placement on special leave with full pay. The Secretary-General has accepted the Board's recommendation that every effort be made to find suitable employment for you within the Organization, compatible with your abilities, including mission service, and that such post need not conform with the conditions which you have sought to have attached to it which are not within your entitlements. The Secretary-General expects that you will not refuse reasonable offers of suitable posts."

On 18 October 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision to place the Applicant on SLWFP was arbitrary, violated due process, and was taken as a sanction against her; this constitutes an abuse of the Secretary-General's discretionary powers.

2. The Respondent acted in bad faith by giving the Applicant assurance that if she accepted a peace-keeping mission, UNDP would endeavour to find her a suitable post at the conclusion of the mission assignment, when in fact the Respondent intended to abolish the Applicant's post.

Whereas the Respondent's principal contentions are:

1. Placement of an unreasonable staff member on special leave with full pay while searching for a suitable position is a reasonable act of administrative discretion.

2. The Applicant was properly considered for available posts for which she might be suited but the very lengthy and thorough searches for such posts proved unsuccessful .

The Tribunal, having deliberated from 1 to 25 July 1997, now pronounces the following judgement:

I. The Applicant received a rating of "unsatisfactory" in her 1992 performance appraisal review (PAR) due to difficulties with her interpersonal skills and, as a result, was placed on special leave with full pay (SLWFP). The Tribunal has not considered it necessary to review the substance of the PAR but notes that the Applicant instituted a rebuttal to the PAR in accordance with established procedures. The Panel of Reference affirmed the unsatisfactory PAR rating. The Tribunal reviewed the decision of the UNDP Department of Personnel (DOP) to put the Applicant on SLWFP.

II. With respect to the initial decision to place the Applicant on SLWFP, the Tribunal agrees with the JAB that this decision was not taken as a disciplinary measure and thus was not subject to due process requirements. It was not motivated by a desire to punish the Applicant for her conduct, but rather by the determination that the Applicant could no longer serve effectively in the DOP. It was within the Respondent's discretion to conclude that the Applicant's use of abusive language, her disruptive outbursts, and her uncooperative disposition contributed to a tense and hostile work environment which prompted two of the Applicant's co-workers to request transfers. It was also within the Respondent's discretion to determine that it would be in the best interest of the Organization to place the Applicant on SLWFP until an alternate post could be found for her. The Tribunal notes that the Respondent's action in preventing the Applicant from access to her computer and collecting her pass contributed to the Applicant's impression that she was being disciplined.

III. The Tribunal is concerned by the Respondent's failure to conform to established performance evaluation procedures. The UNDP/ADM/93/21 of 30 April 1993 articulates a process comprised of "a minimum of three essential and mandatory steps", including a mid-year review, which, together, ensure that the staff member is informed of any problems that may exist in respect of his or her performance. The Respondent failed to abide by his own procedures and deprived the Applicant of a written mid-year evaluation. The Tribunal holds that the Respondent is obliged to respect his own procedures.

IV. The Tribunal is also concerned by the Respondent's correspondence with the Applicant following notification of the SLWFP. The Respondent argues that the purpose of the SLWFP was to remove the Applicant from the DOP where she could no longer serve

effectively, but that during the SLWFP the Respondent would find a new placement for the Applicant. The Respondent's letter to the Applicant, however, states that "if our efforts do not produce the desired results of a new placement[,] we will be pleased to discuss an agreed separation" and that "early retirement may be in your own best interests." The Tribunal holds that not only is SLWFP not a disciplinary measure, but that it should not be used as a mechanism to encourage staff to separate from service or to take early retirement.

V. Although the Respondent's initial decision to place the Applicant on SLWFP was a proper exercise of his discretion, the Tribunal finds that maintaining the SLWFP for three years violated the principles of due process. First, the Tribunal notes the Respondent's rejection of the JAB's unanimous recommendation to suspend the SLWFP pending a determination of the appeal on the merits. The Tribunal also notes that the Respondent generally follows a policy of accepting unanimous JAB recommendations except where a major question of law or principle is involved. Despite the foregoing, the Secretary-General rejected the JAB's unanimous recommendation to suspend the action, overriding the JAB's concern that prolonging the SLWFP might result in irreparable harm to the Applicant. Instead, the Respondent determined that the contested action, a two-month SLWFP, had already been fully implemented and could not therefore be suspended.

The Tribunal finds the Respondent's conclusion on this issue illogical. Precisely because the two-month SLWFP had ended and yet the Applicant remained on special leave, the Respondent should have heeded the JAB's recommendation that further SLWFP would result in irreparable harm.

VI. Second, the Tribunal notes the JAB's determination that, although the SLWFP did not, at that time, amount to a violation of

the Applicant's rights, the duration of the SLWFP for more than a year was "if not excessive, unduly prolonged." The JAB concluded that a staff member has a right to be given a task and that the Organization should make every effort to find the Applicant suitable employment. The Respondent accepted the JAB's recommendations.

VII. Since 1994, the only evidence of the Respondent's attempts to find the Applicant a suitable post are an unsuccessful placement exercise in March 1995 and various interviews in May and June of 1996. While the Tribunal acknowledges the Respondent's recent efforts to find the Applicant employment, the Tribunal is concerned by the lack of efforts made prior to May 1996. The Applicant had been on SLWFP since May 1993 and appears not to have been given consideration for an alternative post until three years later. The Respondent alleges that he had difficulty placing the Applicant because of her 1992 PAR, but provides no evidence to support this claim. Rather, the reports from managers who interviewed the Applicant in May and June 1996 indicate a variety of reasons why the Applicant was not selected. The Tribunal notes that some of the reports indicate a lack of interest on the Applicant's part. However, several other reports suggest that the Applicant simply was not the most qualified candidate or, in at least one instance, was overqualified for the post in question. The Tribunal recognizes that the Respondent was constrained by the availability of alternate posts but this should have motivated him to make a concerted effort throughout the duration of the SLWFP and not simply in its final months. The Tribunal concludes that the Respondent failed to make a serious, good faith effort to find the Applicant an alternative post, thereby incurring considerable expense in continuing the SLWFP for over three years while depriving the Organization of the staff member's service.

VIII. Finally, the Tribunal notes that the personnel report sent to the Applicant in May 1996 indicated that she was posted against a position with effect from 9 February 1997. This report gave the Applicant false hope that her employment with the Organization would continue. The Applicant's reasonable expectations were disappointed when she was notified in August 1996 that her post was to be abolished and that she was to be separated from the Organization. In the context of the Applicant's three year endeavour to end the SLWFP, the decision to separate the Applicant from the Organization, after notifying her that she was to encumber an established post, amounts to bad faith.

IX. The Respondent properly exercised his discretion when he placed the Applicant on SLWFP, pending efforts to find her an alternate post outside the DOP. However, the Respondent failed to suspend the action pending a review of the merits, in contravention of the JAB's unanimous recommendation. He continued the special leave for a three year period. Coupled with the failure to make a serious, good faith effort to find an alternate post throughout the duration of the SLWFP, this amounts to a violation of the Applicant's rights. Although the Applicant suffered no financial loss during the SLWFP, she did suffer from humiliation, stress and uncertainty that continued until her separation from the Organization. The Tribunal has previously awarded compensation for "uncertainties and harassments" despite a lack of financial loss. (Cf. Judgements No. 215, Ogley (1976) and No. 92, Higgins (1954)).

The Tribunal holds that the Applicant is entitled to compensation for the lapses of the Respondent described above and the consequent humiliation, stress and uncertainty she endured throughout the three-year period during which she was placed on SLWFP. The Tribunal assesses this compensation at $3,000.00.

X. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant the amount of $3,000.00.

(Signatures)

Samar SEN
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

Geneva, 25 July 1997

R. Maria VICIEN-MILBURN
Executive Secretary